

CANNING vs CREIGHTON UNIVERSITY

<div>1</div> <div>IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA</div> <div>MARY E. CANNING, Plaintiff, vs. CREIGHTON UNIVERSITY, Defendant.</div> <div>DEPOSITION OF JOLEEN FIXLEY, M.D.</div> <div>DEPOSITION OF JOLEEN FIXLEY, M.D., taken before Tammy J. Hetherington, RPR, CSR, and General Notary Public within and for the State of Nebraska, beginning at 1:44 p.m., on Thursday, the 13th of December, 2018, at Creighton University, Linn Building, Omaha, Nebraska, to be read in evidence on behalf of the plaintiff, pursuant to the Federal Rules of Civil Procedure and the within stipulations.</div> <div>TAMMY J. HETHERINGTON, RPR, CSR MTDS Reporters 7602 Pacific Street, Suite LL101 Omaha, Nebraska 68114 402-397-9669 www.mtdsreporters.com</div>	<div>1</div> <div>INDEX</div> <div>Page</div> <div>DIRECT EXAMINATION BY MR. ZALEWSKI</div> <div>EXHIBITS</div> <table><thead><tr><th>No.</th><th>Description</th><th>Page</th></tr></thead><tbody><tr><td>1</td><td>8/31/15 Faculty Evaluation of IM Resident</td><td>13</td></tr><tr><td>2</td><td>2/27/16 Letter by Mary Canning</td><td>21</td></tr><tr><td>3</td><td>11/4/15 Faculty Evaluation of IM Resident</td><td>25</td></tr><tr><td>4</td><td>2/16/16 Documentation</td><td>33</td></tr><tr><td>5</td><td>9/26/16 HMS - End of Service Evaluation for Interns</td><td>36</td></tr><tr><td>6</td><td>Documentation by Dr. Fixley</td><td>44</td></tr><tr><td>7</td><td>Documentation by Dr. Cichowski</td><td>45</td></tr></tbody></table>	No.	Description	Page	1	8/31/15 Faculty Evaluation of IM Resident	13	2	2/27/16 Letter by Mary Canning	21	3	11/4/15 Faculty Evaluation of IM Resident	25	4	2/16/16 Documentation	33	5	9/26/16 HMS - End of Service Evaluation for Interns	36	6	Documentation by Dr. Fixley	44	7	Documentation by Dr. Cichowski	45
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1	8/31/15 Faculty Evaluation of IM Resident	13																							
2	2/27/16 Letter by Mary Canning	21																							
3	11/4/15 Faculty Evaluation of IM Resident	25																							
4	2/16/16 Documentation	33																							
5	9/26/16 HMS - End of Service Evaluation for Interns	36																							
6	Documentation by Dr. Fixley	44																							
7	Documentation by Dr. Cichowski	45																							
<div>1</div> <div>APPEARANCES</div> <div>For the Plaintiff: Mr. James C. Zalewski Attorney at Law 575 Fallbrook Boulevard Suite 100 Lincoln, Nebraska 68521 jzalewski@ozwlaw.com</div> <div>For the Defendant: Mr. David R. Buntain Attorney at Law 12910 Pierce Street Suite 200 Omaha, Nebraska 68144 dbuntain@clinewilliams.com</div> <div>Also Present: Ms. Mary Canning Mr. David Meiergerd</div>	<div>1</div> <div>(Whereupon, the parties have stipulated to waive Nebraska Rule 6-330, Sections 8(A) and (C), and the following proceedings were had, to wit:) (Exhibit Nos. 1 through 7 marked for identification.)</div> <div>JOLEEN FIXLEY, M.D., having been first duly sworn, was examined and testified as follows:</div> <div>DIRECT EXAMINATION</div> <div>BY MR. ZALEWSKI:</div> <div>01:44PM Q. Would you state your name and address for the record, please.</div> <div>A. Joleen Elizabeth Fixley. My home address?</div> <div>Q. That's fine. You can do that, or you can give an office address, whichever you prefer.</div> <div>01:44PM A. Yeah, my office address is 4101 Woolworth, the VA Medical Center, Omaha, Nebraska 68105.</div> <div>Q. Dr. Fixley, my name is Jim Zalewski. We met just, a little bit, previously. I'm representing Mary Beth Canning in a case she's filed against Creighton in Federal Court. I'm going to ask you some questions about some aspects of that case today.</div> <div>Have you ever had your deposition taken before?</div> <div>A. No.</div> <div>Q. Let me tell you a little bit of the ground rules, how it works. Everything that I'm asking you, and you're</div>																								

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45

1 These are just simple yeses or nos: Did anybody

2 from Creighton, the Clinical Competency Committee,

3 contact you when they were going to place Mary Beth

4 Canning on a performance improvement plan?

02:53PM 5 A. No. As I said, I've never been notified, questioned of

6 any resident being put on a performance plan, either

7 before or after they were put on a performance plan.

8 Q. Or under review or probation, same answer?

9 A. Right, that's not something I'm made aware of.

02:54PM 10 Q. I just wondered if they asked for your input. We're

11 thinking about doing this, how would you --

12 A. No, not only am I not asked for my input, but after

13 somebody is put on a probation, I'm not notified that

14 that's the current status.

02:54PM 15 Q. Okay. You're not told?

16 A. The only way that I would know is if somebody comes

17 back to me, as an intern, when I've already had them

18 for an intern, and by the time in the calendar, they

19 should be a second year. That's the only way I would

02:54PM 20 know.

21 Q. Okay. The last one is Exhibit 7, and I want to point

22 out to you, the middle, big paragraph deals with you,

23 not the other stuff. So I just want to ask you to read

24 that and tell me when you're done, okay?

02:54PM 25 A. (Witness reviewing Exhibit 7.) Where is this from?

46

1 Q. It's from notes that were given to us. It was on a

2 grievance that was filed in a case.

3 A. Okay. What are you asking me about this document?

4 Q. Well, you've read where the first sentence says, Joleen

02:55PM 5 Fixley asked to speak with me; do you see that in that

6 paragraph? Is that accurate?

7 A. Well, I'll read -- let me finish reading the paragraph,

8 but it strikes me there are several inaccuracies here.

9 Q. And that's just what I wanted to ask you.

02:56PM 10 A. Okay, sorry. No, sorry, I'm trying to figure out who

11 this is, sorry.

12 Q. It's Dr. Erica Cichowski.

13 A. Okay.

14 Q. They're her notes about a meeting that happened on

02:56PM 15 January 7th, is what --

16 A. About a meeting? Okay, hang on, hang on. There's a

17 lot in here.

18 Q. Right.

19 A. So I have to strike my earlier statement about there

02:56PM 20 being inaccuracies, I apologize. I need time to read

21 this completely before I make a remark about the

22 contents.

23 Q. Sure. That's why I wanted you to read it.

24 A. (Witness reviewing Exhibit 7.)

02:58PM 25 Okay. So I do recall this conversation --

47

1 Q. All right. Let me ask you --

2 A. -- with Dr. Cichowski, yes, and there is a -- this

3 patient that she alludes to, that I discussed with

4 Dr. Cichowski, this deteriorating patient that Mary

02:59PM 5 Beth was unable to develop a plan of care, and it was

6 also, as I stated earlier, she was not able to document

7 what the evaluation that we did was either.

8 Q. Let me start you on the top here.

9 A. So -- yes.

02:59PM 10 Q. On the third -- you just told me you had no idea when

11 somebody went on a PIP or under review or probation,

12 but, yet, in the third sentence, it says, Joleen

13 reviewed much of what was outlined in MBC's under

14 review and probation letters.

03:00PM 15 A. That's not correct. I don't know what that is

16 referring to.

17 Q. All right.

18 A. Because I don't even know what under review and

19 probation letters are.

03:00PM 20 Q. Did you --

21 A. That's the one thing that is not correct.

22 Q. Okay, that's not correct? What about the sentence

23 where it says, Joleen wanted me to know that low

24 patient volumes, much slower pace on VA HMS did allow

03:00PM 25 her and the supervisor to safely provide direct

48

1 supervision; did you say that?

2 A. Yes, we did discuss the conditions of our hospital

3 service at the times that Mary Beth worked with our

4 team.

03:00PM 5 Q. Okay.

6 A. That, a lot of the time, specifically, the VA floor

7 patients can be complicated, history-wise, and have a

8 lot of past medical history, but overall, not as acute,

9 not as acutely ill as some of the patients at the other

03:01PM 10 hospitals. It's more of a chronic -- it's more chronic

11 illness management, what we do on the floors now. It's

12 necessary to recognize when a patient decompensates and

13 then know how to treat them appropriately.

14 And that one patient that I was referring to, that

03:01PM 15 was the case where we had a decompensating patient,

16 where she did the right thing in calling me, but then

17 was really not even, with my help, able to even

18 document what happened correctly, let alone treat the

19 patient without direct intervention.

03:01PM 20 Q. Let me ask you this: Moving down, there's a statement

21 there about a third of the way where it starts out,

22 Joleen clarified for me that she wants to support MBC,

23 but does not feel MBC should be reinstated in our

24 program; did you say that? Is that accurate?

03:02PM 25 A. I don't recall whether I made a statement regarding

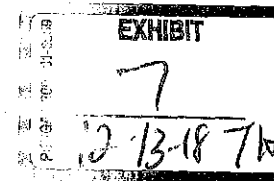
CANNING vs CREIGHTON UNIVERSITY

<p>53</p> <p>1 <u>CORRECTION SHEET</u></p> <p>2 Upon reading the deposition and before</p> <p>3 subscribing thereto, the deponent,</p> <p>4 JOLEEN FIXLEY, M.D., indicated the</p> <p>5 following changes should be made.</p> <p>6 Page Line Change/Reason for change:</p> <p>7 Page Line Change/Reason for change:</p> <p>8 Page Line Change/Reason for change:</p> <p>9 Page Line Change/Reason for change:</p> <p>10 Page Line Change/Reason for change:</p> <p>11 Page Line Change/Reason for change:</p> <p>12 Page Line Change/Reason for change:</p> <p>13 Page Line Change/Reason for change:</p> <p>14 Page Line Change/Reason for change:</p> <p>15 Page Line Change/Reason for change:</p> <p>16</p> <p>17</p> <p>18 _____</p> <p>19 JOLEEN FIXLEY, M.D.</p> <p>20</p> <p>21 Subscribed and sworn to before me this ____ day</p> <p>22 of _____, 2018.</p> <p>23 _____</p> <p>24 NOTARY PUBLIC</p> <p>25</p>	<p>55</p> <p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE DISTRICT OF NEBRASKA</p> <p>3 MARY E. CANNING,)</p> <p>4 Plaintiff,) Case No. 4:18 CV-03023</p> <p>5 vs.)</p> <p>6 CREIGHTON UNIVERSITY,)</p> <p>7 Defendant.) COST CERTIFICATE</p> <p>8</p> <p>9</p> <p>10 CERTIFICATE OF DEPOSITION OF JOLEEN FIXLEY, M.D.</p> <p>11</p> <p>12 Taken in behalf of</p> <p>13 the plaintiff.</p> <p>14 The Original Deposition is</p> <p>15 in the possession of:</p> <p>16 Mr. James C. Zalewski</p> <p>17 Attorney at Law</p> <p>18 575 Fallbrook Boulevard</p> <p>19 Suite 100</p> <p>20 Lincoln, Nebraska 68521</p> <p>21 Costs:</p> <p>22 _____</p> <p>23 Tammy J. Hetherington</p> <p>24 Notary Public</p> <p>25 Date: 12/26/18</p>
<p>54</p> <p>1 <u>CERTIFICATE</u></p> <p>2 STATE OF NEBRASKA)</p> <p>3) ss.</p> <p>4 COUNTY OF DOUGLAS)</p> <p>5 I, TAMMY J. HETHERINGTON, RPR, CSR, and General Notary</p> <p>6 Public in and for the State of Nebraska, do hereby certify</p> <p>7 that JOLEEN FIXLEY, M.D., was by me duly sworn to testify</p> <p>8 to the truth, the whole truth, and nothing but the truth;</p> <p>9 and that the deposition as above set forth was reduced to</p> <p>10 writing by me and is a true and accurate transcription of</p> <p>11 the testimony given by said witness;</p> <p>12 That the within and foregoing deposition was reported</p> <p>13 by me at the time and place herein specified and in</p> <p>14 accordance with the within stipulations, the reading and</p> <p>15 signing of the witness to the deposition having not been</p> <p>16 waived;</p> <p>17 That I am not counsel, attorney or relative of any of</p> <p>18 the parties or otherwise interested in the event of this</p> <p>19 suit.</p> <p>20 IN TESTIMONY WHEREOF, I have placed my hand and</p> <p>21 Notarial Seal this 26th day of December, 2018.</p> <p>22 _____</p> <p>23 General Notary Public</p> <p>24</p> <p>25</p>	<p>56</p> <p>1 DATE: 12/26/18</p> <p>2 TO: JOLEEN FIXLEY, M.D.</p> <p>3 RE: CANNING vs CREIGHTON UNIVERSITY</p> <p>4</p> <p>5 Enclosed please find a transcribed copy of your</p> <p>6 deposition. THIS IS A VALUABLE DOCUMENT, so please</p> <p>7 take a few minutes at this time to do the following:</p> <p>8</p> <p>9 1. Read your deposition thoroughly. Photocopying or</p> <p>10 other reproduction of this document without the</p> <p>11 expressed consent of MTDS Reporters is strictly</p> <p>12 prohibited.</p> <p>13</p> <p>14 2. Make corrections only on the page entitled:</p> <p>15 CORRECTION SHEET.</p> <p>16</p> <p>17 3. Sign on the line indicated on the page entitled</p> <p>18 CORRECTION SHEET and have that page notarized.</p> <p>19</p> <p>20 4. Please return ONLY the Correction Sheet page within</p> <p>21 30 days back to me.</p> <p>22</p> <p>23 5. Failure to read, sign, and return the Correction</p> <p>24 Sheet page within said time will be deemed as a waiver</p> <p>25 of signature.</p> <p>Sincerely,</p> <p>Tammy J. Hetherington, RPR</p> <p>Enclosures</p> <p>Tammy J. Hetherington, RPR, CSR</p> <p>MTDS Reporters</p> <p>7602 Pacific Street, Suite LL101</p> <p>Omaha, Nebraska 68114</p> <p>(402)397-9669</p>

then should could potentially complete that year but if any patient safety issues occurred that termination would be our only ethical option. I acknowledged that perhaps she feels this is unjust but from the CCC perspective, what would be more unjust is if we allow her to practice unsafely and she harms someone and she would never forgive herself because she has such a compassionate heart.

She asked Dr. Hurley if I agree with this. He indicated that he's a CCC member, has been involved with the discussion and decision making and again reviewed the documentation and agrees with this course of action because it's clear that she is unable to progress adequately to be able to treat patients safely.

She gave us her pager and the meeting ended.



Saturday Jan 7, 2017 VA Blue room

Joleen Friley asked to speak with me. She updated me that MBC contacted her and Tim Griffin each supportive letter from each of them. Joleen said MBC shared honestly, all she struggled with's been trying to get along with them earlier this academic year. Joleen reviewed much of what was outlined in MBC's letter and Joleen's letters, as well as the events that led to MBC's termination. Joleen wanted me to know that she was patient with her, say in slower pace on VA WMS did allow her and the supervisor to safely provide direct supervision. Joleen said MBC is a compassionate heart is her strength. She admitted that MBC spent a lot of time connecting and listening to all patients and families but this often seemed to distract her from the medical tasks at hand. Joleen felt MBC had improved this year as compared to her performance on VA WMS last academic year. At the time she was not able to call her when she recognized a deteriorating patient but was unable to develop a plan of care for that patient. While this was an improvement in MBC's performance, we both agreed that this action was at least not expected from medical students, rather than interns. Joleen also admitted that after walking MBC through the case scenario and development of a plan of care for that deteriorating patient, MBC was unable to document in the medical record without significant help. Joleen explained that she hoped MBC could remain in some sort of healthcare career as she's passionate about helping people. She mentioned Family Medicine but upon further discussion, we both agreed that MBC does NOT have the knowledge and skills to be successful in the ICU rotations necessary to graduate from a Family Medicine program. Joleen clarified for me that she wants to support MBC but does NOT feel that MBC should be reinstated our program. She wants to support her in seeking alternative career options. She also is curious why MBC is appealing her termination because MBC shared with her that she no longer wants to continue on with Internal Medicine training and admitted she doesn't have the skill set for success in Internal Medicine. I clarified to Joleen that GME had offered MBC counsel that withdrawing from the program would keep the termination off her record, perhaps helping her be successful in seeking other career options. But if MBC elects to appeal her termination, then the option of withdrawing is no longer available to her. Joleen said she does not think MBC understands this and could be hurting her future options. I shared with Joleen that Dr. Porter let me know face to face that MBC was counseled on her time sensitive option to withdraw. Upon conclusion of this conversation with Joleen, I updated Dr. Porter on the potential confusion on MBC's part.

Thursday Jan 14, 2017

Tim Griffin came to VA Red Clinic to request to speak with me in private. He shared with me that MBC had contacted him for a letter of support. He wanted me to know that he felt obligated to provide her a letter of support because she's such a nice person. He also felt obligated to document that because of the VA WMS' low patient volume and slower pace, he did not experience an inability to provide safe patient care while providing her ongoing direct supervision. He did indicate that he felt the program had provided her plenty of support and opportunity to improve. He also admitted that his previous inpatient work at CUMC allows him to see that perhaps the fast pace and high patient volumes at that site could prove challenging with MBC and her limited skill set. In regards to her termination after forgetting to discharge a patient on anticoagulants, he fears that all of us make mistakes that could put patients in danger. I agreed but shared with him that an error of omission of a discharge medication should be caught with appropriate system support (and was caught in this case), but when a medical provider defends the error by admitting he/she had little